

## The Endangered Species Act

- Passed in 1973 under the Nixon Administration
- To provide a means whereby the **ecosystems** upon which endangered and threatened species depend may be **conserved**, and to provide a program for the conservation of such endangered and threatened species.



## Sections of the ESA

- Section 4: Listing, critical habitat, and recovery plans
- Section 5: Land acquisition
- Section 6: Assistance to States and Territories
- Section 7: Interagency Cooperation**
- Section 8: International Cooperation
- Section 9: Prohibited Acts
- Section 10: Permits (recovery, Habitat Conservation Plans)
- Section 11: Penalties and Enforcement

## Section 7(a)(1)

**Is where agencies  
are guided to  
conserve**



“All Federal agencies shall use their authorities in the furtherance of the purposes of this Act by **carrying out programs for the conservation** of endangered and threatened species.”

## Benefits of Implementing 7(a)(1)

- by ensuring that all Federal agencies are assisting in furthering the conservation of listed species, we will be more likely to fulfill the purposes of the Act;
- ensuring that Federal agencies are addressing the conservation of listed species should streamline and improve consultation under section 7(a)(2).
- This approach provides a more comprehensive landscape-level approach to listed species conservation rather than a project-by-project approach

## Section 7(a)(2)

**Is where  
conservation is  
measured against  
impacts**



“Each Federal agency must, in **consultation** with the Service, ensure that any action funded, authorized, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat.”

## Consultation

- The Consultation is where the Service assists action agencies in meeting their responsibilities to ensure that their actions do not jeopardize or adversely modify listed resources
- A successful Consultation involves good communication among agencies with good working relationships AND early coordination
- Consultation can provide exemption to s9 (take prohibitions)

Consultation being a joint process, it's important that the Service and Action Agency have a good working relationship.

This may require a change in how we think of consultation: It is not the Services' job to "regulate" the action agency in the consultation process, but rather, it is the **action agency's responsibility** to ensure that their actions don't JAM the resource, and it's the Services' job to **assist** them in meeting this responsibility.

Thus, we need to work together, cooperatively, and share information. The Service needs to help the action agency figure out what information to provide and to make sure that the action agency understands how their action may affect listed resources.

This should be a partnership without any hidden surprises. By the time the action agency receives the BO they should already know what the outcome will be.

## Take

- The ESA prohibits the taking of any federally endangered or threatened animal species.
- **Take** is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.



## Harm and Harass

- **Harm** includes significant habitat modification or degradation that results in death or injury to listed wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.
- **Harass** is defined as intentional or negligent actions that create the likelihood of injury to listed wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering.



## Section 9 (a)(2) – Plants

It is unlawful for any person to:

- Remove and reduce to possession plants under Federal jurisdiction
- Maliciously damage or destroy plants on any other area in knowing violation of any state law

*No exemption possible through section 7*

### ANIMATED

Turn to page 28 (ESA) (#2) and highlight *plants* and *import* and *export* and *remove* and *reduce to possession* and *maliciously damage or destroy* and *remove, cut, dig up, or damage or destroy* and *in knowing violation of any law or regulation of any state or in the course of any violation of a state criminal trespass law, and deliver, receive, carry transport, or ship, and sell and violate any regulation pertaining to such species.*

Remind class that affected plants must be addressed in the BA.

Although there is no exemption, collection and destruction can be permitted through section 10.

## What Triggers Consultation?

- Federal nexus
- Discretion
- The proposed action, “**may affect**” a listed species and/or designated critical habitat



## Effect Determinations

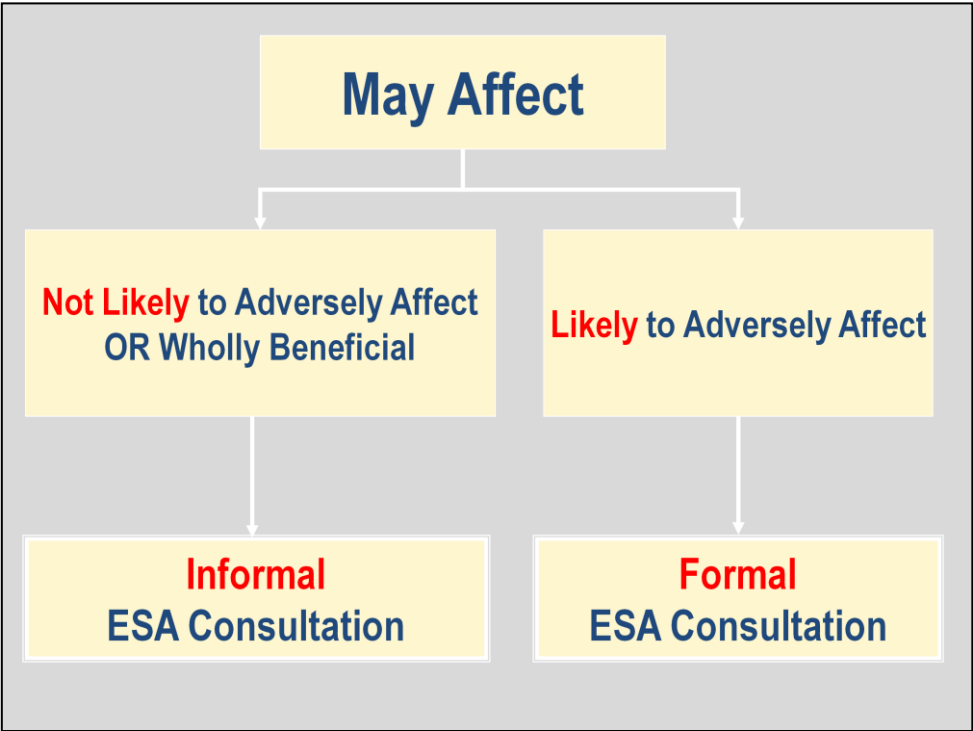
- No Effect
- May Affect, Not Likely to Adversely Affect
- May Affect, Likely to Adversely Affect



**No Effect**  
to Listed Species or Critical Habitat

MEANING: **NO** Effect





**May Affect, Not Likely to Adversely Affect  
Listed Species or Critical Habitat**

The appropriate conclusion when the effects on  
a species or its critical habitat are likely to be:

- ❖ Wholly beneficial
- ❖ Discountable
- ❖ Insignificant

➤ ***Concurrence from the ES Office is required***

## Informal Consultation

- Communications prior to or in lieu of initiation of formal consultation
- Can result in minor modifications to avoid adverse effects to listed species
- Can lead to formal consultation
- May end in the Service providing the Federal agency with **concurrence** that the project is not likely to adversely affect listed species or critical habitat

**May Affect, Likely to  
Adversely Affect  
Listed Species or Critical Habitat**

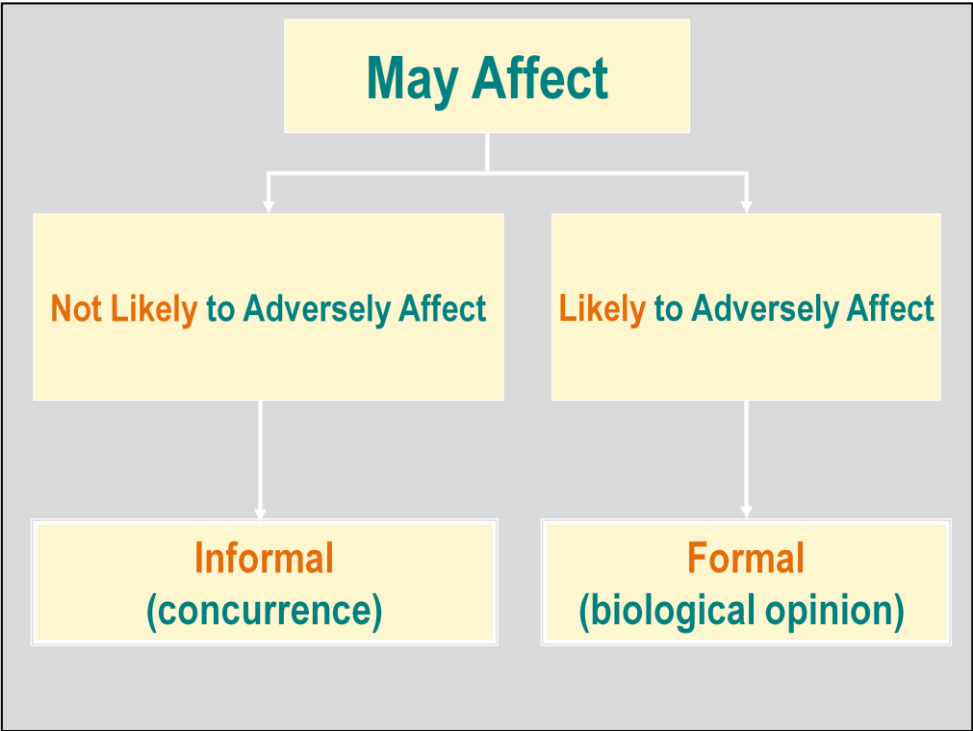
The appropriate conclusion when an action is likely to **directly or indirectly** have any adverse effect on a listed species or its critical habitat (even if short-term).

➤ *Formal Consultation is required*



## Formal Consultation

- Occurs when the action agency and Service determine that a listed species or critical habitat **is likely to be adversely affected** by the action
- 135 day statutory time frame
- Conclusion is “jeopardy” or “no jeopardy” and/or “adverse modification” or “no adverse modification”
- A jeopardy or adverse modification conclusion requires development of “reasonable and prudent alternatives”



**INSTRUCTOR’S NOTE:**

Use the flow chart to show the progression one last time and then note that we will cover concurrences and biological opinions over the next few modules.

## Components of a BO

- Consultation History
- Description of the Proposed Action
- Status of the Species (range-wide)
- Environmental Baseline
- Effects of the action
- Cumulative effects
- Conclusion
- Incidental Take Statement

## Jeopardy

“Jeopardize the continued existence of” means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

### INSTRUCTOR’S NOTE:

Even a casual reading indicates that we are looking for some *change* in the likelihood of survival and recovery of the species. With that in mind, let’s look carefully at these words, which are verbatim from 50 CFR 402.02.

Let’s start with ‘action.’ An ‘action’ is an action; somebody is doing something, such as providing funding, issuing a permit, implementing a project. This may seem overly simple but you will run into times when the best way to determine what to do is to ask yourself: Just what is the action?

“that reasonably would be expected” basically means that you need to make the arguments in your analysis such that someone can see how you got from point A to point Z. You need to connect the dots biologically and legally.

“directly or indirectly” goes back our discussion of direct and indirect effects; again, it’s more important to make a good case that all these effects are likely to occur than to nail them down as being either direct or indirect.

“to reduce (appreciably) the likelihood” means we have a likelihood of a downward change or movement of the status of the species. We will get to “appreciably” in a minute. Think about this for a second: likelihood. The regulations do not say we have to prove something beyond a reasonable doubt. We need to find a reasonable likelihood of reduction.

## Jeopardy

For the species:

Status of the species range-wide

+ environmental baseline

+ effects of the action on the species

+ cumulative effects related to the species

= jeopardy or no jeopardy.

### INSTRUCTOR'S NOTE:

For the species, we need to think about the equation on the slide within the context of the reproduction, numbers, or distribution of the species when we are thinking about our jeopardy conclusion. All those dots we have been connecting between and among the basic ecology of the species, its distribution range-wide and in the action area, and all the effects of the action on it need to come together to provide a credible conclusion with regard to whether the action, as proposed, is likely to jeopardize the continued existence of the species.

Status of the species range-wide

+ environmental baseline (status of the species in the action area)

+ effects of the action on the species (based on the information in the project description)

+ cumulative effects related to the species

= jeopardy or no jeopardy.

## Adverse Modification

Adverse modification would occur if the critical habitat does not remain functional (or retain its current ability for the primary constituent elements (PCEs) to be functionally established) to serve the intended conservation role for the species.

### INSTRUCTOR'S NOTE:

The definition on the slide is adapted from the December 9, 2005, memorandum from the Director of the Service regarding changes to how we define adverse modification.

It is basically saying that adverse modification would be the appropriate conclusion to reach if the proposed action appreciably impairs the ability of critical habitat to function in the manner for which it was designated. In the simplest example, if critical habitat was designated because of the importance of an area for breeding, adverse modification would occur if the action appreciably impaired its ability to support breeding.

If multiple units of critical habitat have been designated, we again need to look at their intended conservation roles. In the simplest case, one unit of critical habitat has a conservation role of supporting breeding and the other supports wintering habitat; the loss of one of these units would seem to impair the conservation role.

Consider a different scenario where we designated many units of critical habitat for the species and they all serve the same functions. In this case, the loss of one entire unit may not appreciably impair the conservation role and function of critical habitat. Based on this cursory analysis, would that be adverse modification?

### INCLUDE IN NOTEBOOK:

Use the following procedures to conduct your analysis of effects to critical habitat:

1. In the Status of Critical Habitat section, describe the primary constituent elements as defined in the final rule and discuss their current condition with regard to the entire area of critical habitat.
2. In the Environmental Baseline section, discuss the current condition of critical habitat in the action area, the factors responsible for that condition, and the conservation role of the critical habitat unit.

## Adverse Modification

For critical habitat:

- Status of all designated critical habitat
- + environmental baseline
- + effects of the action on the PCE's
- + cumulative effects related to critical habitat
- = adverse modification or no adverse modification.

### INSTRUCTOR'S NOTE:

We saw a very similar equation for the species a few minutes ago. As we go through these next points, keep in mind what we discussed for the species and note the similarities and differences for critical habitat.

For critical habitat, we need to think about the equation on the slide within the context of the primary constituent elements of critical habitat and their conservation role and function when we are thinking about our adverse modification conclusion. Now the dots to connect relate to the primary constituent elements of critical habitat, the conservation role of critical habitat (both in a particular unit and overall, if appropriate), and how it is functioning throughout the entire area of designated critical habitat and in the action area, and all the effects of the action. These dots need to come together to provide a credible conclusion with regard to whether the action, as proposed, is likely to adversely modify critical habitat.

- Status of all designated critical habitat
- + environmental baseline (status of critical habitat in the action area)
- + effects of the action on the primary constituent elements (based on the information in the project description)
- + cumulative effects related to critical habitat
- = adverse modification or no adverse modification

## Adverse Modification

Key things to remember about adverse modification:

1. Adverse effect  $\neq$  adverse modification
2. The conclusion applies to the entire area of designated critical habitat
3. We do not have a legal definition for DAM – but we are working on it 😊

### INSTRUCTOR'S NOTE:

#### Point 1:

An important concept to understand is that an adverse effect on critical habitat does not automatically equal adverse modification. The trigger to prompt the need for formal consultation is “likely to adversely affect,” which is the exact same trigger that we have for the species. Once we are in formal consultation for the species or critical habitat, NOAA or FWS then conducts the analysis of whether the action is likely to jeopardize the continued existence of the species or adversely modify its critical habitat.

#### Point 2:

We must remember that the conclusion applies to the entire area of designated critical habitat. The easiest adverse modification call you will ever get to consider is if you have one piece of critical habitat and someone proposes to completely level the entire place. With only that information, that seems like a pretty safe call.

Now, let's look at some more complicated examples. (Consider going over these as an interactive exercise by asking students what they think of each situation and why.)

What if we had 50 critical habitat units, they all served the exact same conservation role, and only one would be leveled?



## Incidental Take Statement

- Only issued if “no jeopardy”
- Provides coverage for incidental take
- Includes **reasonable and prudent measures**
  - general actions to minimize take
- Also includes **terms and conditions** –
  - specific actions to minimize take

## How Are Proposed Species and Candidates Addressed in S7?

- Proposed species have a parallel consultation process called “conference”
  - Can be addressed formally with a take statement that goes into effect if the species is listed
  - A good idea to address for longer-term projects
- Candidate species can be addressed at the request of an action agency
  - Some agencies (e.g., FWS) treat candidate species as proposed for the purposes of consultation

## More about Conferencing

- A conference may follow the procedures for formal consultation and include an incidental take statement
- A conference may be combined with formal consultation and a biological opinion
- A conference opinion may be confirmed as a biological opinion once the species is listed
- We can use the same procedures for a concurrence request (i.e. informal conference)

Instructor Notes:

Let's conduct a quick review of how a conference works.

Point 1.

As in formal consultation, the Federal agency requests initiation of formal consultation. NOAA or FWS can request a conference if it determines one is necessary.

Point 2.

The Federal agency can request that the conference follow the procedures for a formal consultation. If NOAA or FWS agree, we follow the exact same procedures that we use for formal consultation and issue a conference opinion. In a conference opinion, the incidental take statement does not become effective until the species is listed. ASK CLASS WHY THEY THINK THIS MAY BE. Answer: The incidental take statement provides an exemption to the section 9 prohibitions. These do not take effect until the species is listed. Therefore, you cannot prohibit something that is not illegal.

Point 3.

If the proposed action involves any combination of a listed species and designated critical habitat and a proposed species and proposed critical habitat, the biological opinion and conference opinion may be combined into one document call a "biological and conference opinion." Combine the standardized languages to complete this document; the handbook contains examples.

Point 4.

If the proposed species is listed or the proposed critical habitat is designated before the project is completed, the conference opinion can be adopted as a biological opinion - if "no significant new information is developed ... and no significant changes to the Federal action are made..." If this option is available, the Federal agency requests that a conference opinion be converted and NOAA or FWS respond in writing.

Going back to the concept that the incidental take statement is not in effect until the species is listed, we consider it a good idea for the Federal agency to implement the reasonable and prudent measures and terms and conditions of the conference opinion – even though they were not mandatory – because this practice is likely to facilitate the conformation of the conference opinion and a biological opinion.

Point 5.

Self-explanatory.

Point 6.

The section 7(d) prohibition against the irreversible and irretrievable commitment of resources does not apply during the conference process. ASK CLASS WHY THEY THINK THIS MAY BE. Answer: Because section 7(a)(2) does not apply to a proposed species or proposed critical habitat. If the prohibition against jeopardy or adverse modification is not in force, then the Federal agency does not have to take measures to avoid precluding any reasonable and prudent alternatives.

Questions?

